DRN-3043418

The complaint

Mrs M complains about Options UK Personal Pensions LLP, trading as Carey Pensions UK LLP (Carey) at the time of the relevant events, accepting an application for a Self- Invested Personal Pension (SIPP) and an investment into Carbon Credits from an unregulated business called New Frontier Advisory Ltd (NFAL). For simplicity, I have referred to Options UK Personal Pensions LLP as "Carey" throughout this decision. Mrs M says she's suffered a loss from the Carbon Credits investment and that Carey should compensate her for her loss.

What happened

I issued a provisional decision on 22 July 2021. In the provisional decision I set out why I was minded to uphold the complaint and make an award. The provisional decision is being sent with this final decision and should be read in conjunction with, and forms part of, this final decision.

I did not receive any further submissions from Carey or Mrs M in response to the provisional decision.

Copy of provisional decision 1

complaint

Mrs M complains that after being referred to Carey Pensions UK LLP (Carey) – which was a provider of Self-Invested Personal Pension plans (SIPPs) - by an unregulated business called New Frontier Advisory Ltd (NFAL), her pension was switched to Carey and then an investment was made into Carbon Credits. Mrs M now can't sell the Carbon Credits. She says Carey should compensate her for her loss. Options UK Personal Pensions LLP (Options) is responsible for the complaint and the acts about which Mrs M complains.

background

An ombudsman at this service previously considered the complaint and issued a provisional decision dated 31 August 2017. A copy is attached and forms part of this decision. In that provisional decision the ombudsman said she was minded to uphold the complaint.

The background to Mrs M's complaint is set out in the attached provisional decision and I would refer the parties to it. However, in brief, Mrs M says New Frontier contacted her by phone in October 2011. She says it told her about carbon credits and presented them as, "a major new way of investing for future growth". It called her back later and told her about a specific project which she agreed to invest in. NFAL then put her in touch with Carey so that she could set up a SIPP and transfer her existing pension to it. This was so that she could invest her pension funds in Carbon Credits. Mrs M went on to transfer her pension to a (then) Carey SIPP and invest most of her pension funds (£38,000) in Carbon Credits.

Carey is a SIPP provider and administrator. At the time of the events in this complaint, *Carey was regulated by the Financial Services Authority (“FSA"), which later became the Financial Conduct Authority (“FCA"). Carey was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.*

The ombudsman, in her provisional decision of 31 August 2017, set out that she hadn’t seen any evidence that Carey had carried out due diligence on NFAL. Her view was that this should’ve included an understanding of the nature of NFAL and its work; what its business objectives were; the types of clients it dealt with; the levels of business it conducted; the types of investments it dealt with; and whether it used other SIPP operators. It should have also put in place an agreement setting out its relationship with NFAL.

If it carried out these activities, she thought it likely that Carey would have discovered that NFAL wasn’t regulated – although the evidence that Carey should have been aware of was that it was carrying out regulated activities by advising on the merits of switching from an existing pension to a SIPP. Mrs M had indicated in correspondence with it that she was receiving advice from NFAL in relation to the pension switch to the Carey SIPP.

Carey would have also discovered that NFAL was specialising in Carbon Credits, which had been identified as, “an immature market with a limited and slightly chequered history”.

In terms of Carey’s investigations and consideration of Carbon Credits as an investment to be held in a SIPP, about a year prior to Mrs M’s application Carey said it’d instructed a third party business to review whether the Carbon Credits could be held within a SIPP. A report was produced in October 2010. That report concluded the investment was liquid; could be included in a SIPP; and was unlikely to attract any pension scheme tax charges. At that time it’d also reviewed the information it could find about Carbon-ex. In particular, its website; its brochure; and its investment model. It says these appeared professional to it and gave a good overview of the business.

Carbon-ex (via a network of unregulated introducers, such as NAFL) purported to offer a service which involved it buying Carbon Credits for a consumer, then selling them on to businesses.

The ombudsman set out that such investments were unlikely to be suitable for the majority of retail investors and were only likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

Furthermore it was discussed that Carey would have discovered that NFAL had filed dormant company accounts for the year up to 31 July 2011, on 19 October 2011 - which showed assets of £2 - and that it hadn’t filed any accounts at the point Mrs M’s investment was made. The ombudsman set out that on 13 December 2011 – the day before Mrs M signed the Carbon Credit contract and her investment was made – a First Gazette notice for compulsory strike-off was published that said:

> *The REGISTRAR OF COMPANIES gives NOTICE that, unless cause is shown to the contrary, at the expiration of 3 months from the above date [13 December 2011] the name of*
>
> *NEW FRONTIER ADVISORY LTD*
>
> *will be struck off the register and the company will be dissolved.*

She thought this should have raised concerns and that proceeding to allow the investment would put Mrs M at risk.

The ombudsman also thought that Carey had not undertaken sufficient due diligence on the Carbon Credit investment itself. And if it had carried this out Carey ought to have known there was a high chance of consumer detriment. She was not persuaded that Carey had acted with due skill, care and diligence, or treated Mrs M fairly by accepting the investment.

She didn't believe the disclaimers that Mrs M had signed when making the investment meant that Carey wasn't required to carry out due diligence on either NFAL or the investment itself. If it had done so then the point would never have arrived when Mrs M had to sign such disclaimers, because it should have identified that the investment should not have been accepted into the SIPP.

Mrs M accepted the provisional decision.

Carey did not accept the provisional decision and made further submissions. I have considered them in full. But, in summary, it said:

- *This provisional decision is using hindsight and weight is not being given to the cotemporaneous evidence.*

- *Only the 2009 SIPP report existed at the point Mrs M's SIPP was set up and her Carbon Credits investment was made. This wasn't guidance and all it did was make suggestions. The other report, guidance and "Dear CEO" letter I referred to aren't relevant and it's not fair and reasonable to consider the complaint in the context of them. The way the regulator expects the SIPP sector to implement the rules and Principles has developed over time.*

- *The ombudsman needed to specifically say what legal liability it had. It didn't breach any rules.*

- *It acted on an execution only basis and didn't advise Mrs M. And it made this clear to her. It's not allowed to give advice or comment on the suitability of investments.*

- *It didn't know about NFAL's involvement until after the SIPP had been set up and Mrs M's pension had been moved to it. NFAL didn't introduce Mrs M to it.*

- *Even if NFAL had introduced Mrs M to it, it had no duty or obligation to undertake due diligence on it or enter into an agreement with it. It had no legal duty to do so. And it didn't have an ongoing relationship with NFAL.*

- *It didn't accept everything that came its way. It undertook sufficient due diligence on the Carbon Credits investment and established that it could be held within a UK pension – that being the full extent of its obligations.*

- *If it had undertaken the level of due diligence the ombudsman set out then this would not have indicated any reasons not to deal with NFAL or accept the Carbon Credits investment.*

- *It identified the Carbon Credits investment as high risk, speculative and non-standard and it made Mrs M sign a clear warning to acknowledge that. The investment was legitimate and Mrs M owns Carbon Credits. It's not under any regulatory obligation to make sure an investment can be independently valued and* *this wouldn't be indicative of its performance or legitimacy anyway.*

- *The ombudsman's provisional decision amounts to a decision that it should have assessed the suitability of the investment in Carbon Credits which is fundamentally wrong. The ombudsman shouldn't be considering whether the investment was suitable for Mrs M because it wasn't required to assess this.*

- *Even if it'd carried out the level of due diligence the ombudsman said it should have, this wouldn't have revealed any reason not to accept the Carbon Credits investment. All the concerns she'd identified related to the suitability of Carbon Credits – not their legitimacy or the ability to hold them in a UK pension. But in any event, it seems there was a market for the Carbon Credits and they weren't a scam.*

- *It's not fair and reasonable to say Mrs M – who invested after being told of the risks – wouldn't have invested if it'd given her warnings.*

- *There were lots of ways Mrs M could have invested in Carbon Credits if it'd rejected her business. And it's most likely she would have gone ahead with the investment even if it'd taken all the steps the ombudsman said it should have.*

- *Mrs M and other parties had contributed to her losses and so it's not fair to hold it fully responsible.*

- *There's no evidence to support the ombudsman's award of £500 for the trouble and upset Mrs M had been caused.*

my provisional findings

In arriving at a decision that she believed was fair and reasonable in the circumstances, the ombudsman in her provisional decision of 31 August 2017 set out that she took into account relevant law and regulations; regulators' rules; guidance and standards; codes of practice; and what she considered to have been good industry practice at the time. I have also considered these matters in light of Carey's further submissions to arrive at a decision that is fair and reasonable in the circumstances.

the Principles

In my view, the FCA's (previously FSA) Principles for Businesses are of particular relevance to my decision. The Principles for Businesses, which are set out in the FCA's handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G). And, I consider that the Principles relevant to this complaint include Principle 2, 3 and 6 which say:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I have carefully considered the relevant law and what this says about the application of *the FCA's Principles. In R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:*

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In (R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBA judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in the Berkeley Burke case upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I have taken account of both these judgments when making this decision on Mrs M's case.

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of these judgments provide any assistance with the application of the Principles for Businesses, and in particular, they say nothing about how the Principles apply to an ombudsman's consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in Berkeley Burke. So I think it reasonable to say it would agree the Principles are a relevant consideration.

regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles:

- *The 2009 and 2012 thematic review reports.*
- *The October 2013 finalised SIPP operator guidance.*
- *The July 2014 "Dear CEO" letter.*

I have set out below what I consider to be the key parts of the publications (although I have considered them in their entirety).

the 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

the later publications

In the October 2013 finalised SIPP operator guidance, the FCA states:

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

The October 2013 finalised SIPP operator guidance also set out the following:

"Relationships between firms that advise and introduce prospective members and SIPP operators

Examples of good practice we observed during our work with SIPP operators include the following:

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un- authorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and *retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 "Dear CEO" letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The "Dear CEO" letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *Correctly establishing and understanding the nature of an investment*

- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*

- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*

- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*

- *Ensuring that an investment is not impaired (for example that previous investors* *have received income if expected, or that any investment providers are credit worthy etc)*

I have considered Options submissions about the regulatory publications and I acknowledge that the 2009 report (and the 2012 report and the "Dear CEO" letter) are not formal guidance (whereas the 2013 finalised guidance is). However, I am of the view the fact that the reports and "Dear CEO" letter did not constitute formal (i.e. statutory) guidance does not mean their importance or relevance should be underestimated.

The publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I am therefore satisfied it is appropriate to take them into account.

I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the relevant events. It is clear from the text of the 2009 and 2012 reports, (and the "Dear CEO" letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles. I note that HHJ Dight in the Adams case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that in considering what is fair and reasonable, I will only consider Carey's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I do not say the Principles or the publications obliged Carey to ensure the investment in Carbon Credits was suitable for Mrs M. It is accepted Carey was not required to give advice to Mrs M, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

I would also add, that even if I took the view that any publications or guidance that post-dated the events subject of this complaint do not help to clarify the type of good industry practice that existed at the relevant time (which I don't), that does not alter my view on what I consider to have been good industry practice at the time. That is because I find that the 2009 report together with the Principles provide a very clear indication of what

Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from NFAL and/or allowing the Carbon Credit investment into the SIPP.

Ultimately, in determining this complaint, I need to consider whether Carey complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Carey could have done to comply with its regulatory obligations.

what did Carey's obligations mean in practice?

I accept Options submission that Carey didn't give Mrs M any advice. But bearing in mind its role as a SIPP provider and its reasonable duties and obligations as I have discussed, I'm satisfied it should still have thought carefully about:

- *Whether accepting the business from NFAL was treating its customer – Mrs M – fairly; taking reasonable care; and acting with due skill, care and diligence.*

- *Whether accepting the Carbon Credits investment was treating its customer – Mrs M – fairly; taking reasonable care; and acting with due skill, care and diligence.*

the due diligence carried out by Carey on NFAL – and what it should have done

Carey says it didn't know about NFAL's involvement until after the SIPP had been set up and Mrs M's pension had been moved to it. Having reviewed the evidence, I don't agree. Mrs M says when she initially spoke to Carey about the Carbon Credits investment, it said it didn't recognise it and asked her for more information. On 26 October 2011 – several weeks before the SIPP was set up – Mrs M forwarded onto Carey information about Carbon Credits that had initially been sent to her by NFAL. It was reasonably clear the information had initially been sent by NFAL.

I'm therefore satisfied it's more likely that, on this occasion, when Carey took on this business it should have known that NFAL had directed Mrs M to it. Or, at least it was put on notice that NFAL was involved and if, then, Carey had undertaken reasonable due diligence it would have confirmed that NFAL was acting as an introducer to Carey.

Furthermore, significantly before the Carbon Credit investment was made, Carey was aware of the involvement of NFAL. It has confirmed that in November 2011 it corresponded several times with NFAL to enable the investment in Carbon Credits to go ahead, including supplying an authority so that NFAL could be the 'introducer' for Mrs M. So Carey was aware that NFAL was materially involved with Mrs M's investment into Carbon Credits.

Carey says that even if NFAL had introduced Mrs M to it, it had no legal duty to enter into an agreement with it. I accept it may not have had an ongoing relationship with NFAL. But, the September 2009 report I have referred to earlier was explicit in setting out that it's good practice for SIPP operators to have business agreements in place with intermediaries introducing SIPP business. It doesn't say that's only the case where there's an ongoing relationship or an agreement should only be put in place after a certain amount of business has been submitted or introductions made. Taking into account the guidance to clarify the responsibilities and limitations of the introducer, I *think it is fair and reasonable to say such consideration should have involved C&PP getting a full understanding of the business model of the introducer, satisfying itself that the introducer would not be carrying out regulated activities, putting a clear agreement in place between it and the introducer and ensuring careful thought was given to the risk generally posed to consumers by the introducer.my view is that clarifying the responsibilities and limitations in this instance would still have been important.*

Carey also says that even if NFAL introduced Mrs M to it, it had no legal duty to carry out due diligence on it. But I'm satisfied that in order to treat its customer – Mrs M – fairly; take reasonable care; and act with due skill, care and diligence it should have carried out due diligence on NFAL. And it that it would have been good practice for it to do so.

if Carey had completed sufficient due diligence on NFAL, what should it reasonably have concluded?

As the previous ombudsman discussed in her provisional decision, NFAL wasn't regulated to give pensions or investment advice or carry on any other regulated activities. However the evidence suggested that it was carrying out regulated activities by advising on the merits of switching from an existing pension to a SIPP.

The previous ombudsman referred to an email Mrs M sent Carey on 30 November 2011 which set out, "my financial adviser (from NFAL) has asked me to sign this form and email it to you to finalise the necessary paper work between us all". I also note that the member declaration Carey required Mrs M to sign said, "I confirm that I have taken appropriate advice in respect of this investment". This wasn't evidence available when the SIPP was set up but it indicates the nature of the relationship between Mrs M and NFAL – something Carey would have likely discovered if it had undertaken sufficient due diligence on NFAL.

Options says that even if it'd carried out the level of due diligence the ombudsman previously set out, this wouldn't have revealed any reason not to deal with NFAL. But having reviewed the evidence, I don't agree. The fact Mrs M described NFAL as her financial adviser may have simply been a passing comment. But I don't think that takes away from the significance of it. If anything, I'm satisfied it's a good indication of how she viewed the relationship. It's also not the only evidence suggesting that NFAL advised her. The member declaration Carey required her to sign confirmed she'd taken "appropriate advice" in relation to the investment.

I recognise Carey's points about the records at Companies House regarding the notice for compulsory strike-off for NFAL and that, "small businesses regularly miss administrative deadlines so this wouldn't have caused any concern".

But it remains that as part of its due diligence on NFAL, I would have expected it to investigate its financial standing. If it'd done this, it would have discovered there weren't any accounts that'd been filed – something that then seems to have resulted in a notice for compulsory strike-off. If it'd investigated this further, it seems likely it would either have been told accounts weren't yet available or it would have been given a version of accounts similar to what was later filed for the year up to 31 August 2011. Either way, it would have been presented with an image of a small immature company which seemingly could not manage its affairs appropriately.

Taking all these factors into account, Carey should have had significant concerns about NFAL. In particular it would have discovered that this was an unregulated introducer with a limited track record, providing advice to Mrs M and specialising in unregulated high risk

Carbon Credit investments. And so I'm still satisfied that Carey ought to have known Mrs M's dealings with NFAL were putting her at risk.

But even if I'm wrong about this, for the reasons I've set out below, I'm still satisfied that accepting the Carbon Credits investment wasn't treating Mrs M fairly; taking reasonable care; or acting with due skill, care and diligence. And that conclusion on its own would be enough to uphold the complaint.

the due diligence carried out by Carey on the Carbon Credits investment – and what it should have done

Options said that Carey carry out due diligence and did sometimes turn down investments. It says it established Carbon Credits could be held in a UK pension and this was all it needed to do. But as the ombudsman set out in her provisional decision, and as I have discussed in this decision, I don't agree this was all it needed to do. Taking everything into account, I'm satisfied that it should – as a minimum – have:

- *Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment, so it should have carried out thorough due diligence on it.*
- *Examined where Mrs M's money would be invested – in other words, what type of Carbon Credit she was investing in.*
- *Considered whether the investment was suitable for a personal pension scheme.*
- *Made sure the investment was genuine – in other words, not a scam or linked to fraudulent activity.*
- *Made sure the investment worked as claimed.*
- *Ensured that the investment could be independently valued, both at the point of purchase and subsequently.*
- *Ensured Mrs M's SIPP wouldn't become a vehicle for a high-risk and speculative investment.*

Carey only obtained a fairly brief report about Carbon Credits and then not the specific investment Mrs M was to make. As it said, Carey only sought to identify whether Carbon Credits could be validly held in a SIPP – its consideration did not go further than this.

NFAL specialised in Carbon Credits. Carey itself had received information to the effect that this was, "an immature market with a limited and slightly chequered history" and the FSA had identified that "trading on these markets requires skill and experience". These investments were unlikely to be suitable for the majority of retail investors. And they were only likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

Mrs M's "Carbon Credit Contract" sets out that the sale was being made by Carbon-ex SARL – a company registered in Luxembourg and Carey. The original contract, later amended due to a slight reduction in amount to be invested, set out that she was to buy "8165 VCS standard carbon credits". The project was set out:

"Project id: unfccc id 93
Project Type: Energy industries
Project name: Malana, 86 MW Hydro Project in Himachal Pradesh"

The contract contained the following risk warning:

"There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances, it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments. You should not invest in Carbon Credits unless you have thought carefully about whether you can afford to do so and have taken appropriate Independent advice."

Here Carbon-ex sold "units" to Mrs M which, according to Carbon-ex, followed the Voluntary Carbon Standard (VCS). These units were issued by a hydro-electric plant in India, at £4.90 each. The basis for Carey sending about £38,000 to Carbon Ex on behalf of Mrs M is a contract which says Mrs M has agreed to buy 7755 of these units, and to pay £190 commission to Carbon-ex. However, the contract does not say when the credits were generated, and the project is described as "unfccc id 93", but no such project appears to be registered with the United Nations Framework Convention on Climate Change (UNFCCC). So it would appear that the project isn't registered as the contract suggests.

There is also no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price Carbon-ex was acquiring the units or Carbon Credits. So there was no way to establish how the £4.90 price was being arrived at. The report obtained by Carey as to Carbon Credits says the trades are reflective of exchange prices but the exchange is not defined and it is not defined in Mrs M's contract. There could have been a very significant difference between the price Carbon-ex was paying for the units and the price it sold them to Mrs M. This is something Carey could have investigated.

Assuming that Mrs M would hold valid units or credits, there does not appear to be any measure of the quality of the credits in question. So were the units or credits being 'generated' in India valid? Carbon-ex said the units met the VCS standard but I have not seen any independent verification of this. As discussed above, I have not seen evidence of a registration of the project with the UNFCCC. The lack of that registration would suggest that the relevant standard has not been met.

Whilst Carbon-ex said that such units or credits were liquid and could be readily sold (notwithstanding that the risk warning I have referred to set out that the holding might be difficult to sell), I have not seen that it was demonstrated by Carbon-ex that there was any ready market for Mrs M's units. It was not demonstrated how Mrs M would find businesses to buy her small allocation of VERs.

At the time there was little confirmation that Mrs M's SIPP was acquiring anything of any realisable value, whether the units existed or, if they did, whether they were being sold at inflated prices.

Carey submitted that carrying out the kind of assessment that would be required to establish and interrogate such factors as I have discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things Carey needed to do when accepting Mrs M's proposed investment to meet the regulatory obligations placed on it by the Principles. I don't agree that this amounts to a decision that Carey should have assessed the suitability of the Carbon Credits investment for Mrs M's individual circumstances.

Although I accept Carey did do some due diligence, this doesn't seem to have extended beyond looking at Carbon-ex's website and marketing brochures and a report from a third party that was written over a year before Mrs M's investment. The report also wasn't very detailed or conclusive. The due diligence therefore didn't cover all – or even a significant number of – the points I've set out above. So I'm satisfied that in these specific circumstances Carey didn't carry out due diligence at the time to satisfy its reasonable responsibilities as a SIPP provider.

if Carey had completed sufficient due diligence on the Mrs M's Carbon Credit investment, what should it reasonably have concluded?

Carey submitted that even if it carried out the level of due diligence the previous ombudsman said it should, this wouldn't have revealed any reason not to accept the Carbon Credit investment. In these particular circumstances, I don't agree.

The previous ombudsman set out in her provisional decision the matters that due diligence would have revealed. And I have also discussed these matter above. I agree that these things should have caused Carey concern. And I don't agree those concerns are only with the benefit of hindsight.

It could be that the investment was/is legitimate and that Mrs M owns Carbon Credits. I also accept there technically there was a market for Carbon Credits. But it's now been highlighted that it often wasn't possible to sell them even though there was a market for them. And in particular, there are reports that voluntary Carbon Credits aren't actively traded and that buyers don't buy from private individuals. So although they technically worked as claimed, the reality was very different.

The FSA warning that the previous ombudsman highlighted in her provisional decision was published several months before Mrs M's SIPP was set up and this made it clear that there may be issues with selling Carbon Credits. I'm satisfied this is something Carey should have identified as part of its due diligence and the fact Mrs M might then have struggled to realise

the investment should have caused it concern – especially considering that almost all the money transferred (about £41,000) to the SIPP by Mrs M was invested in Carbon Credits. How would Mrs M be able to take benefits from her pension if the investment was difficult to value or realise?

Carey has previously said that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on the Carbon Credits being sold for more than what was paid for them. And so I think there should have been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it's now been highlighted that voluntary Carbon Credits were sold at "significantly inflated prices" so it seems likely this would then have been identified.

Options should also have been aware that Mrs M was unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or this service.

In the circumstances, I'm still satisfied there were a number of concerns Carey should have identified. It should have known there was a high chance of consumer detriment and it shouldn't have added the Carbon Credits to the list of permitted investments for Mrs M's SIPP. By doing so, I still think it didn't act with due skill, care and diligence or *treat Mrs M fairly.*

To be clear, I'm not making a finding that Carey should have assessed the suitability of the Carbon Credit investment for Mrs M. I accept Carey had no obligation to give advice to Ms M, or to ensure otherwise the suitability of an investment for her.

At the point Mrs M's investment was arranged Carey would have been aware that she was investing the vast majority of her pension fund in an unregulated, esoteric and high risk investment which might be difficult to sell. I acknowledge that Carey wouldn't be aware whether that was the entirely of her pension savings because she may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mrs M was being exposed. It was also aware of the involvement of an unregulated business specialising in Carbon Credits which Mrs M had indicated was advising her to take out the investment.
These were 'red flags' which should have caused Carey significant concern as to whether to allow Mrs M to hold that investment in her SIPP.

I am satisfied Carey could have identified the concerns I have mentioned, and ought to have drawn the conclusion I have set out, based on what was known at the time. Carey ought to have identified significant points of concern, and these ought to have led it to conclude it should not accept the Carbon Credit investment. It ought to have known there was a high risk of detriment to Mrs M.

in conclusion

After considering these points, I don't regard it as fair and reasonable to conclude that Carey acted with due skill, care and diligence, or treated Mrs M fairly by accepting the investment in Carbon Credits or accepting the application for the SIPP. Carey didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mrs M's funds to be put at significant risk as a result.

did Carey act fairly and reasonably in proceeding with Mrs M's instructions?

In my view, for the reasons given, Carey simply should have refused to accept Mrs M's application. So things should not have got beyond that. Had Carey acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it should not have accepted Mrs M's application to open a SIPP or make the investment.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Mrs M to sign 'risk' or 'indemnity' declarations was not an effective way for Carey to meet its regulatory obligations to treat her fairly, given the concerns Carey ought to have had about her introduction and the investment.

Having identified a risk, it is my view that the fair and reasonable thing to do would be to refuse to accept the business and the investment in Carbon Credits – not put in place a process asking Mrs M to sign declarations in an attempt to absolve itself of responsibility. I don't think the declarations Mrs M signed meant that Carey could ignore its duty to treat her fairly.

Carey says it's not fair and reasonable to say Mrs M – who invested after being told of the risks – wouldn't have invested if it'd refused her application and investment. It says there were lots of ways she could have invested in Carbon Credits if it'd rejected her business. And it's most likely she would have gone ahead with the investment even if it'd *taken all the steps the ombudsman said it should have.*

I've considered this carefully, but I don't agree. Carey refusing to accept business and sharing the concerns that led to that decision would have likely meant that Mrs M would have acted very differently. This refusal would have tended to highlight the concerns with making such an investment. And in any event I do not believe it is reasonable to assume that another SIPP operator would have accepted Mrs M's application, had it declined it. I don't think it's fair and reasonable to say that Options should not compensate Mrs M for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found Carey did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application or investment.

Carey also says Mrs M and other parties had contributed to her losses and so it's not fair to hold it fully responsible. But I've concluded Mrs M wouldn't have invested but for Carey's failure to carry out sufficient due diligence. And in these circumstances, I'm satisfied it's fair to hold it responsible for the whole of the loss suffered. I'm not asking it to account for loss that goes beyond the consequences of its failings.

Oher parties may have contributed to Mrs M's losses. But NFAL was unregulated and was therefore reliant on Carey for access to Mrs M's pension. As set out above, I'm satisfied that Carey should have put a stop to the transactions and that the pension switch and investment wouldn't have gone ahead if it'd treated Mrs M fairly and reasonably. I've carefully considered Carey's arguments about causation, contributory negligence, apportionment of damages and DISP 3.6.4. But in the circumstances here, I'm still satisfied it's fair for Carey to compensate Mrs M for her full loss.

Putting things right

I am satisfied that Carey's failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mrs M suffering a significant loss to her pension.

And, my aim is therefore to return Mrs M to the pension position she would now be in but for Carey's failings.

Carey should calculate fair compensation by comparing the current position to the position Mrs M would be in if she had not transferred from her existing pension. In summary, Carey should:

1. *Calculate the loss Mrs M has suffered as a result of making the switch and Carbon Credits investment.*
2. *Take ownership of the Carbon Credits investment if possible.*
3. *Pay compensation for the loss into Mrs M's pension. If that is not possible pay compensation for the loss to Mr M direct. In either case the payment should take into account necessary adjustments set out below.*
4. *Pay £500 for the trouble and upset caused.*

I'll explain how Carey should carry out the calculation set out at 1-3 above in further detail below:

1. *Calculate the loss Mrs M has suffered as a result of making the transfer*

To do this, Carey should work out the likely value of Mrs M's pension as at the date of my final decision, had she left it where it was instead of switching to the SIPP.

Carey should ask Mrs M's former pension provider to calculate the current notional transfer value had she not switched her pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of my final decision and this will show the loss Mrs M has suffered. The Carbon Credit investment should be assumed to have no value.

2. Take ownership of the Carbon Credit investment

Carey should take ownership of the Carbon Credit investment, for a nil consideration, if possible.

If Carey is unable to take ownership of the Carbon Credit investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. However, it would not be fair for Mrs M to have any ongoing fees to pay in relation to the SIPP. So, in the event Carey is unable to take ownership of the Carbon Credit investment (and it can't otherwise be removed from the SIPP), it should waive any fees associated with the SIPP, until such a time as the SIPP can be closed.

3. Pay compensation to Mrs M for loss she has suffered calculated in (1).

Since the loss Mrs M has suffered is within her pension it is right that I try to restore the value of her pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mrs M could claim. The notional allowance should be calculated using Mrs M's marginal rate of tax.

On the other hand, Mrs M may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mrs M direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mrs M should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mrs M's marginal rate of tax in retirement. For example, if Mrs M is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mrs M would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 for the trouble and upset caused.

Mrs M has been caused some distress and inconvenience by the loss of her pension benefits. This is money Mrs M cannot afford to lose and the difficulties she has faced in trying to sell an investment she otherwise should not have had would have added to her distress. I consider that a payment of £500 is appropriate to compensate for that upset.

Interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of her acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

my provisional decision

My provisional decision is that I uphold Mrs M's complaint against Options UK Personal Pensions LLP and intend to order it to pay fair compensation as set out above.

Copy of provisional decision 2

complaint

Mrs M complains that after being referred to Carey Pensions UK LLP (Carey) by an unregulated business called New Frontier Advisory Ltd, her pension was switched to Carey and then an investment was made into carbon credits. Mrs M now can't sell the carbon credits. She says Carey should compensate her for her loss.

background

Mrs M was contacted by an unregulated business called New Frontier Advisory. Following that contact she switched her pension to Carey and invested into carbon credits through
New Frontier Partnership Ltd and Carbon-ex SARL. I've set out the various parties and relationships involved in detail below.

Carey

Carey is a self-invested personal pension (SIPP) provider and administrator. It was regulated by the Financial Services Authority (FSA) at the time of the events complaints about – now the Financial Conduct Authority (FCA). It was – and still is – authorised to arrange (bring about) deals in investments; deal in investments as principal; establish, operate and wind up a personal pension scheme; and make arrangements with a view to transactions in investments.

New Frontier Advisory ("New Frontier")

New Frontier was an unregulated business that specialised in trading in carbon credits. It said it wasn't a financial advisor but would introduce Mrs M both to carbon credits and a SIPP operator.

New Frontier received a winding up order in May 2014. The director of New Frontier was Charles Denbigh. On 15 September 2015, Mr Denbigh was disqualified as a director for 14 years. The Official Receiver in the Public Interest Unit said "Mr Denbigh should have known that the carbon credits…his company was selling, and the price his company charged for those products, meant that they were wholly unsuitable as an investment".

Carbon-ex SARL

Carbon-ex SARL was registered in Luxembourg. It provided trading accounts which could be used for the buying and selling of carbon credits. The objective was to achieve *long term capital growth through the buying and selling of these credits.*

On 14 December 2011 Mrs M purchased £38,000 of voluntary carbon credits and paid £190 commission. Mrs M has since tried to sell her carbon credits but has been unable to do so.

New Frontier Partnership

New Frontier Partnership was an unregulated business. It was a marketing partner of Carbon-ex SARL. And it's this business Mrs M's carbon credits were purchased through.

New Frontier Partnership received a winding up order in February 2016 – along with a number of similar businesses. At the time, the Company Investigations Supervisor in the Insolvency Service said "This stoke of boiler rooms was one giant scam emitting the now all too familiar hot air on an industrial scale, persuading ordinary people to part with their hard earned savings to invest in near worthless voluntary carbon credits which were aggressively pedalled to them by these companies at significantly inflated prices".

Mrs M's dealings with Carey and New Frontier

Mrs M says New Frontier contacted her by phone in October 2011. She says it told her about carbon credits and presented them as "a major new way of investing for future growth". It called her back later and told her about a specific project which she agreed to invest in.

Mrs M says New Frontier then put her in touch with Carey. It said it knew Carey and had dealt with it in the past. But when she spoke to Carey it didn't recognise the investment and asked for more information. On 26 October 2011, Mrs M therefore emailed information about carbon credits to Carey. That information had initially been sent to her by New Frontier.

Carey says it looked into its records at that point and established it'd already carried out due diligence on the investment. It therefore sent the relevant forms – including a SIPP application form – to Mrs M to be filled in.

The SIPP application form was dated 8 November 2011. This asked Mrs M to tick a box if she'd received advice on the transfer of funds and if so, to provide the details of the individual who'd provided that advice. Both the box and the section to fill in details of the individual were left blank. The form went on to say:

I understand that it is my sole responsibility to make decisions relating to the purchase, retention or sale of any investment held within the Carey Pension Scheme…

…I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in anyway able to provide me with any advice.

I confirm that I am establishing the Carey Pension Scheme on an execution only basis.

The key facts and terms and conditions that were provided contained similar provisions. For example, the key facts said:

You can appoint an adviser or manage the investments yourself. You (or your adviser) must tell us what investments to make. We do not give advice.

And the terms and conditions said:

We are not responsible for the investment decisions you make.

Carey then received a letter of authority from Mrs M dated 29 November 2011 which gave authority for information on her pension and investments to be passed to New Frontier.

On 8 December 2011 Mrs M signed a "CARBONEX MEMBER DECLARATION & INDEMNITY" provided to her by Carey. That said:

I…instruct Carey Pension Trustees UK Ltd to Open an Account with Carbon-Ex to purchase and sell Carbon Credits for a consideration of £38,000 on my behalf for the above Scheme.

I am fully aware that this is investment is an "Alternative" type of Investment and may be High Risk and/or Speculative.

I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment.

I confirm that I have taken appropriate advice in respect of this investment.

Mrs M then signed a "CARBON CREDIT CONTRACT" which was dated 14 December 2011. That said:

All investments are speculative and will fluctuate in value. It should not be assumed that the value of investments will always rise. Past performance is not a reliable indicator of future results. You may get back less than the amount originally invested or even lose the full amount. You should carefully consider in light of your financial resources whether investing in Carbon Credits is suitable for you…

…There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances, it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments. You should not invest in Carbon Credits unless you have thought carefully about whether you can afford to do so and have taken appropriate independent advice.

Representations made by our sale consultants, agents or sales literature either orally, in paper or electronic form do not form part of these Terms. We give no warranty as to the future value of Carbon Credits.

Forwards, options and other derivative contracts in relation to Carbon Credits are regulated investments in the United Kingdom. However, Carbon Credits sold by Carbonex are not derivatives and, as such, are not regulated investments. Accordingly, Carbonex is not required to be regulated by the Financial Services Authority ("FSA") or any other regulator in the United Kingdom. This means, among other things, that a person buying Carbon Credits from Carbonex will not benefit from any protections afforded by the FSA and would not have access to the Financial Services Ombudsman or the Financial Services Compensation Scheme.

Later that day it was confirmed that the deal had been completed.

the relationship between Carey and New Frontier

Carey says it's never had a relationship with New Frontier. It says the first communication it received from New Frontier was an email dated 28 November 2011 which said Mrs M wanted to invest into carbon credits. There was then further communication about the forms that needed to be filled in. This included Carey sending an authority letter to New Frontier on 29 November 2011. The email that accompanied the form said:

This is an authority letter you can use for clients you are introducing to Carey's, therefore, you will need to get them to complete the letter.

On 30 November 2011, Mrs M emailed the written authority – dated 29 November 2011 – to Carey allowing Carey to deal with New Frontier. That email said:

my financial adviser [from New Frontier] has asked me to sign this form and email it to you to finalise the necessary paper work between us all.

Mrs M's complaint

Mrs M complains that:

- She's tried to sell her carbon credits but has been unable to do so. She wasn't told the carbon credits were a long-term investment. And she hasn't received any income from them.

- The investment wasn't suitable for individuals and Carey ought to have known this.

- Carey had a duty of care to her and should've carried out due diligence.

Carey's position

Carey says:

- It didn't give Mrs M any advice – either in relation to the establishment of the SIPP or the underlying investment. It simply acts as the trustee and administrator of her SIPP. It acted on Mrs M's instructions. And it received the SIPP application on an "execution only" basis. This is supported by its declaration of trust and the various SIPP documents.

- The member declaration Mrs M signed confirmed she understood Carey hadn't provided any advice and had acted on an execution only basis. She'd also confirmed she'd taken appropriate financial advice.

- Because it hadn't given Mrs M any advice, it wasn't responsible for assessing the suitability of the investment for Mrs M.

- The member declaration and carbon credit contract Mrs M signed included relevant risk warnings about the investment. In particular, Mrs M confirmed she understood the investment she was making was high risk and speculative and that she might lose the full amount of the investment. It was made clear to Mrs M that she should carefully consider whether the investment was suitable for her.

- *If New Frontier didn't tell Mrs M everything it should've done about the investment, that's New Frontier's responsibility and not something Carey is responsible for.*

- *New Frontier isn't – and has never been – an introducer of business to it.*

- *Due diligence had been carried out on the investment to determine that it wasn't taxable property and was a legitimate investment.*

the adjudicator's view

An adjudicator didn't recommend the complaint be upheld. He was satisfied Carey hadn't given Mrs M advice and had acted on an execution only basis.

further information provided by Carey

We asked Carey to provide us with some further information. In response to our requests, it confirmed:

- *It'd first become aware of this type of carbon credits when contacted by a business not connected to New Frontier on 14 October 2010 asking if they could be included in a Carey SIPP.*

- *At that time it'd instructed a third party business to review whether the carbon credits could be held within a SIPP. A report was produced on 15 October 2010 and was circulated with an email on 19 October 2010. That report concluded the investment was liquid; could be included in a SIPP; and was unlikely to attract any pension scheme tax charges.*

- *At that time it'd also reviewed the information it could find about Carbon-ex. In particular, its website; its brochure; and its investment model. It says these appeared professional to it and gave a good overview of the business.*

- *On 25 October 2010 it'd held an Investment Committee Meeting to decide whether to accept the investment. It decided to accept the investment provided that:*

    - *Each customer investing in it completed an "Alternative Investment Member Declaration and Indemnity" that set out the risks.*

    - *Where relevant, the customer adviser issued an "Alternative Investment Adviser Notification Letter" to set out that the investment had been discussed and the customer wanted to proceed.*

    - *Its limitation of liability wording was added to all contracts and assignment documents.*

    - *The acceptance of the investment was notified internally on 26 October 2010.*

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. When considering what's fair and reasonable in all the circumstances, I need to take into account relevant law and regulations; regulators' rules; guidance and standards; codes of practice; and (where *appropriate) what I consider to have been good industry practice at the time.*

relevant considerations

There are a number of things of relevance to my decision about what is fair and reasonable in this case. In particular:

- *The Principles for Businesses set out in the FCA's handbook.*

- *The September 2009 FSA report on the findings of a SIPP operator thematic review.*

- *The October 2012 FSA report on the findings of a SIPP operator thematic review.*

- *The October 2013 FCA SIPP operator guidance.*

- *The July 2014 "Dear CEO" letter.*

the Principles for Businesses

I think Principles 2, 3 and 6 are of particular relevance here:

Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

PRIN 1.1.2G says:

The Principles are a general statement of the fundamental obligations of firms under the regulatory system.

And in British Bankers Association, R (on the application of) v The Financial Services Authority & Anor [2011] EWHC 999 (Admin) (20 April 2011) Ouseley J said:

Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the [Financial Ombudsman Service] would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.

…The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.

So, when deciding what's fair and reasonable in the circumstances of this case, the factors I need to take into account are the requirements placed on Carey by the Principles, as these are relevant rules to be taken into account. And it follows I must consider whether Carey fairly and reasonably did enough to meet the regulatory obligations placed on it by the Principles.

the thematic review reports, guidance and "Dear CEO" letter

The regulators (the FSA and later the FCA) issued reports, guidance and a "Dear CEO" letter following the 2009 and 2012 thematic reviews of SIPP operators. Reports were issued in September 2009 and October 2012; guidance in October 2013; and the "Dear CEO" letter in July 2014.

I'm satisfied these are all relevant here. They provide a reminder that the Principles apply and guidance about the kinds of things a SIPP operator might do to produce the outcomes envisaged by the Principles.

I accept the "Dear CEO" letter, and the September 2009 and October 2012 reports aren't formal guidance – whereas the October 2013 guidance is. But this doesn't mean their importance should be underestimated. They contain the regulator's thoughts on how regulatory obligations might be met, and therefore must be viewed as significant.

I don't accept any argument that the regulators' standards changed over time. I recognise that some of these publications were made after the events subject to complaint, but the Principles that underpin them existed throughout. Carey's regulatory obligations existed from the outset of Mrs M's relationship with it. So the reports, letter and guidance – which each gave the regulators' view on the kinds of steps a SIPP operator might take in practice to achieve the outcomes envisaged by the Principles – are each relevant considerations in this case. Some were issued after the events subject to complaint, but the regulations and Principles that underpin them existed throughout.

It's also clear from the text of the September 2009 and October 2012 reports and the July 2014 "Dear CEO" letter that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves didn't change.

This doesn't mean deciding what is fair and reasonable involves only asking whether Carey did as the regulators suggested in those documents. The reports, letter and guidance gave non exhaustive guidance – they didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet such regulatory obligations is dependent on the circumstances. And it was ultimately for a business to decide for itself how to meet its regulatory obligations – it shouldn't have been reliant on the regulator to tell it what to do.

For the purposes of this decision, I've only quoted selected parts of the publications which I think are of particular relevance. But I have considered them in their entirety.

The September 2009 report included the following:

We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers (IFAs).

…We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 included clients.

…We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs.

…The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

The October 2012 report included the following:

Principle 2 of the Principles for Business, states 'a firm must conduct its business with due skill, care and diligence'.

Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by their members or the introducers who use their schemes, to identify potential risks to their members or to the firms itself. In some firms this was made worse by an over-reliance on third parties to conduct due diligence on behalf of the operator. In some cases this has resulted in taxable investments being inadvertently held, and monies invested in potentially fraudulent investments.

The October 2013 guidance included the following:

Examples of good practice we observed during our work with SIPP operators include the following:

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

…Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:
…
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

…Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:
…
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

  - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

  - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm* *to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm.*

And the Annex to the July 2014 "Dear CEO" letter included the following:

Principle 2 of the FCA's Principles for Business requires all firms to conduct their business with due skill, care and diligence. SIPP operators should ensure that they conduct and retain appropriate and sufficient due diligence, for example, assessing that assets allowed into a scheme are appropriate for a pension scheme. Our thematic review found that most SIPP operators failed to undertake adequate due diligence on high-risk, speculative and non- standard investments despite being aware of the Financial Services Authority (FSA) guidance originally published in 2012 which clarified our expectations of firm conduct.

Our review assessed due diligence processes in these five key areas:

- *correctly establishing and understanding the nature of an investment*

- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*

- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*

- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*

- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive.

We found that most firms do not have the expertise or resources to assess this type of business, but were still allowing transactions to go ahead. This increases the risk that a pension scheme may become a vehicle for high risk and speculative investments that are not secure assets, many of which could be scams. It is not acceptable for firms to put consumers at risk this way.

Although our thematic review focussed on non-standard investments, it is important to note that guidance on due diligence applies to all investments.

Findings from our review included firms failing to:

- *understand the nature of an investment, especially contracts for rights to future income, and sale and repurchase agreements*

- *check that money was being paid to legitimate businesses, and*

• to independently verify that assets were real and secure, or that investment schemes operated as claimed

We found that, typically, firms had difficulty completing due diligence for non-standard overseas investment schemes where firms did not have access to local qualified legal professionals or accountants. Also, since the last review of SIPP operators, we noted an increase in the number of opaque investment structures, such as special purpose vehicles and limited companies, created to pool investment monies and finance other businesses. Firms had difficulty establishing where money was being sent, and whether underlying investment propositions were genuine.

We also found that many SIPP operators accepted investments into their schemes without adequate consideration of how investments could be valued or realised.

Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments.

what did Carey's obligations mean in practice?

Taking everything into account, I'm satisfied Carey should have thought carefully about:

• *Whether accepting the business from New Frontier was treating its customer – Mrs M – fairly; taking reasonable care; and acting with due skill, care and diligence.*

• *Whether accepting the investment was treating its customer – Mrs M – fairly; taking reasonable care; and acting with due skill, care and diligence. And I'm satisfied that should've gone further than simply checking the investment was allowed in a SIPP under HMRC rules.*

To accept everything that came its way and ask its customer to accept warnings absolving it of the consequences wasn't enough. I therefore need to consider whether Carey gave enough thought to the nature of Mrs M's referral to it and the investment that was being requested. And whether it ought to have been aware that the nature of the business and/or the nature of the investment meant it shouldn't accept it.

So in order to fairly and reasonably decide this case, I need to think about the nature of Mrs M's referral to Carey and the nature of the investment she made. I need to decide what, acting fairly and reasonably, Carey should have concluded in relation to these.

the due diligence carried out by Carey on New Frontier – and what it should have done

I can't see that Carey carried out any due diligence on New Frontier. It also didn't have an introducer agreement in place with it.

Carey says this is because it didn't have a relationship with New Frontier and didn't take introductions from it. This may have been the general position. But on this occasion it took on business from Mrs M knowing that New Frontier had directed her to it. New Frontier therefore acted as an introducer to Carey on this occasion.

The September 2009 report was explicit in saying that it's good practice for SIPP operators to have in place business agreements with intermediaries introducing SIPP business. Taking everything into account, my view is that Carey should've put in place an agreement governing its relationship with New Frontier to clarify the responsibilities *and limitations of New Frontier – for example, expressly recording that New Frontier shouldn't give advice.*

I'm also satisfied it should've carried out due diligence on New Frontier. This should've included understanding the nature of New Frontier and its work; what its business objectives were; the types of clients it dealt with; the levels of business it conducted; the types of investments it dealt with; and whether it used other SIPP operators.

if Carey had completed sufficient due diligence on New Frontier, what should it reasonably have concluded?

Had Carey carried out sufficient due diligence, it's most likely it would've identified points of concern. The evidence shows that, at the time of proceeding with Mrs M's instructions, Carey either knew, or ought to have known that:

- *New Frontier Advisory wasn't regulated despite evidence to suggest that it was carrying out regulated activities by advising on the merits of switching from an existing pension to a SIPP. I say this because the email Mrs M sent Carey on 30 November 2011 said "my financial adviser [from New Frontier Advisory] has asked me to sign this form and email it to you to finalise the necessary paper work between us all". I also note that the member declaration Carey required Mrs M to sign said "I confirm that I have taken appropriate advice in respect of this investment".*

- *New Frontier specialised in carbon credits. Carey itself had identified that this was "an immature market with a limited and slightly chequered history" and the FSA had identified that "trading on these markets requires skill and experience". These investments were unlikely to be suitable for the majority of retail investors. And they were only likely to be suitable for a small element of the investment portfolio of a sophisticated investor.*

- *New Frontier Partnership had filed dormant company accounts (for the year up to 31 July 2011) on 19 October 2011. These showed assets of £2.*

- *New Frontier Advisory hadn't filed any accounts at the point Mrs M's investment was made. The first set of accounts it filed (for the year up to 31 August 2011) were subject to the small company accounts exemption and showed net current assets of only £15,451. On 13 December 2011 – the day before Mrs M signed the carbon credit contract and her investment was made – a First Gazette notice for compulsory strike-off was published that said:*

The REGISTRAR OF COMPANIES gives NOTICE that, unless cause is shown to the contrary, at the expiration of 3 months from the above date [13 December 2011] the name of

NEW FRONTIER ADVISORY LTD

will be struck off the register and the company will be dissolved.

These would've been significant concerns. And so I'm satisfied Carey ought to have known Mrs M's dealings with New Frontier were putting her at risk.

the due diligence carried out by Carey on the carbon credits investment – and what it should have done

Based on the information Carey has sent this service, it appears to have carried out *limited due diligence on the investment itself. Other than looking at Carbon-ex's website and marketing brochures, the only due diligence it carried out seems to have been a report from a third party that was written over a year before Mrs M's investment.*

The report isn't very detailed. It says it's likely the investment would qualify for a SIPP but it isn't conclusive on this. Further, an email that was sent on 19 October 2010 – after the report that had been carried out – said:

The interim investment commentary is attached for this one. I say 'interim' as I must admit carbon credit trading is a completely new one to me. As far as I can tell, there do seem to be exchanges that will set the price for carbon credits although my sense is this is an immature market with a limited and slightly chequered history. Having said that, I cannot see any obvious reasons why it should not be allowed, however I will continue to do a bit more research generally.

This service hasn't been provided with any further research that was done.

Taking everything into account, I think the research Carey carried out and the report it commissioned were of limited value. And in my view, by relying on this research and report, Carey didn't meet its regulatory obligations and didn't act fairly or reasonably in its dealings with Mrs M.

In relation to the due diligence it should have carried out, my view is that it should – as a minimum – have:

- *Identified the carbon credits project as a high-risk, speculative and non-standard investment, so it should have carried out more due diligence.*
- *Examined where Mrs M's money was going – in other words, what type of carbon credits it was buying.*
- *Considered whether the investment was suitable for a pension scheme.*
- *Made sure the investment was genuine – in other words, not a scam or linked to fraudulent activity.*
- *Made sure the investment worked as claimed.*
- *Ensured that the investment could be independently valued, both at the point of purchase and subsequently.*
- *Ensured Mrs M's SIPP wouldn't become a vehicle for a high-risk and speculative investment.*

I accept Carey took some steps to meet its obligations. But I don't believe they were enough to satisfy all of these points.

if Carey had completed sufficient due diligence on the carbon credits, what should it reasonably have concluded?

Had Carey carried out sufficient due diligence, it's most likely it would've identified points of concern. The evidence shows that, at the time of proceeding with Mrs M's instructions, Carey either knew, or ought to have known that:

- *The FSA had issued a consumer warning in relation to carbon credit trading on 3*

August 2011. This said:

Whilst not all carbon credit trading schemes are a scam, it is often not made clear to investors that trading on these markets requires skill and experience.

You may lose money on your investment by not being able to sell, or at least get a competitive rate, when trading a small volume of carbon credits.

- *Carbon-ex was nothing more than a platform. And it didn't know where Mrs M's money was going to be going.*

- *Mrs M's contract was for voluntary carbon credits. This market was unregulated and the credits weren't traded on regulated exchanges.*

- *The investment was predicated on carbon credits being sold for more than what was paid for them. But there's no evidence that Carey asked questions to make sure they could be independently valued and there was a market for selling them. It's now been highlighted that voluntary carbon credits were sold at "significantly inflated prices" and it often wasn't possible to sell them. In particular, there are reports that voluntary carbon credits aren't actively traded and that buyers don't buy from private individuals. I'm satisfied this could've been identified before Mrs M's investment was made.*

- *The trading exchange Carbon-ex was quoted on had only been founded in December 2007.*

- *The company that'd been named on the investment when Carey carried out its due diligence in 2010 was Carbon-ex GMBH – based in Germany. The company Mrs M entered into the carbon credit contract with was Carbon-ex SARL – based in Luxembourg. Carbon-ex SARL only filed its incorporation documents on 1 October 2010. The fact it was based abroad was also an extra risk factor. And there's no evidence that Carey asked any questions that would've allowed it to weigh up the risk created.*

If Carey had considered these points, I'm satisfied it should reasonably have concluded the investment wasn't acceptable for Mrs M's pension scheme – that is, it shouldn't have added it to the list of permitted investments for Mrs M's SIPP. In particular:

- *It wasn't clear there was – or ever would be – a market for the carbon credits Mrs M was buying. This would mean Mrs M might have struggled to realise the investment when she wanted to take benefits from her pension or make changes to it.*

- *The investment allowed Mrs M's SIPP to become a vehicle for a high-risk and speculative investment that wasn't secure and might have been a scam.*

Carey ought to have known there was a high chance of consumer detriment. And I'm not persuaded Carey acted with due skill, care and diligence, or treated Mrs M fairly by accepting the investment. Carey didn't meet its regulatory obligations, and it allowed Mrs M's funds to be put at significant risk as a result.

did Carey act fairly and reasonably in proceeding with Mrs M's instructions?

I've thought carefully about whether Carey acted fairly and reasonably when it proceeded with the instructions Mrs M gave.

I accept Carey issued a number of warnings and disclaimers about the possible risks of the investment. And that it suggested Mrs M seek independent advice. But I don't think *any of these warnings or disclaimers mean Carey now has no responsibility. I accept it's possible Mrs M would've avoided the losses she's suffered if she'd placed more weight on those warnings and/or taken advice. But the risk warnings weren't an adequate substitute for Carey carrying out adequate due diligence and drawing reasonable conclusions from that. That wouldn't be a fair and reasonable conclusion in light of what I've set out above.*

Carey was the regulated entity here. And Carey was the expert. Mrs M wasn't. Carey ought to have had serious concerns about both New Frontier's business and the carbon credits Mrs M was investing in. And those concerns should've led Carey to conclude it shouldn't:

- *accept business from New Frontier; or*
- *add the carbon credits investment to the list of permitted investments for Mrs M's SIPP.*

So Mrs M shouldn't have got to the point of signing disclaimers at all.

Whether or not Mrs M read the documentation she signed, it seems clear to me that she didn't understand it. She's said "It was my assumption when I signed with Carey pension UK, a fully government regulated company, I would be fully protected from any miss selling and that before any transfer was undertaken the qualifications and back ground and bank details of so claimed company would be fully undertaken".

So it seems likely Mrs M simply signed all the forms she was given without a full understanding of what they meant or the implications for her. Her willingness to do this does her no credit. With hindsight, it was clearly unwise for her to sign the documents. It was also unwise of Mrs M to respond to a call from a business previously unknown to her. But I've seen nothing to suggest Mrs M's behaviour was dishonest – rather than unwise or careless.

Carey says it accepted Mrs M's investment on an execution only basis and therefore it acted reasonably in executing her instructions. I've thought about this carefully but I don't agree. In light of the conclusions I've reached, I don't accept its argument that it had no choice but to follow her instruction.

overall conclusions

To be clear, I'm not making a finding that Carey should've assessed the suitability of the investment or SIPP for Mrs M. I accept Carey had no obligation to give advice to Mrs M, or otherwise ensure the suitability of the pension product or investment for her.

For the reasons set out above, my finding is that Carey didn't meet its regulatory obligations. If it had done, I'm satisfied it:

- *Shouldn't have accepted the business from New Frontier.*
- *Should've concluded the carbon credits investment wasn't acceptable for Mrs M's pension scheme.*

It then shouldn't have accepted Mrs M's application to open a SIPP with it to make the carbon credits investment.

In the circumstances, it's my view that it failed to treat Mrs M fairly or act with due skill, *care and diligence or take reasonable care to organise and control its affairs responsibly.*

causation

If Carey had told Mrs M that it wouldn’t accept business from New Frontier or the carbon credits investment, I think there are three possibilities:

- *Mrs M would’ve decided to do nothing and would’ve left her pension where it was. In that case, she wouldn’t have suffered losses as a result of making the investment.*

- *Mrs M would’ve asked New Frontier to go ahead anyway, and placed the business through a different SIPP operator.*

- *Mrs M would’ve gone elsewhere, and arranged the pension switch (and subsequent investment) through a third party.*

For the reasons I explain below, I’m satisfied if Carey had treated Mrs M fairly, it’s much more likely than not that she would’ve decided not to go ahead with the investment, and would not have suffered the losses she did.

what would Mrs M have done if Carey hadn’t accepted the business?

If Carey hadn’t allowed the introduction from New Frontier or the investment, Mrs M wouldn’t have been able to invest in the carbon credits unless she’d found another way to do this. If Carey had told Mrs M that its concerns meant it wasn’t prepared to deal with New Frontier at all, I think that would’ve led Mrs M to question what New Frontier had told her. And, as Carey was the regulated entity, I think she’d have taken its refusal to deal with New Frontier as a reason for her not to have any further dealings with it either. So, if Carey had done what it should’ve done, I’m satisfied Mrs M would also have chosen to terminate her own relationship with New Frontier. In the circumstances here, I consider it’s unlikely that Mrs M would’ve sought help from a third party to make the investment.

the involvement of other parties

I accept that Carey isn’t responsible for initiating the course of action that’s led to Mrs M’s loss. It was New Frontier, not Carey, who originally contacted Mrs M. And Mrs M had already made the decision to invest before she approached Carey. But New Frontier was unregulated and was therefore reliant on Carey for access to Mrs M’s pension.

I consider that Carey failed unreasonably to put a stop to the transactions when it should’ve done. If Carey had treated Mrs M fairly and reasonably, then the pension switch and associated investment wouldn’t have gone ahead.

I’m satisfied that given the specific circumstances of Mrs M’s complaint, it’d be fair and reasonable to make an award. This is notwithstanding any arguments about a break in the “chain of causation” and the “remoteness” of the loss from Carey’s errors. Had it not been for Carey’s failure to carry out sufficient due diligence into New Frontier and carbon credits, Mrs M wouldn’t have invested. And I consider that Carey completely disregarded her interests.

As a direct result of Carey’s actions, Mrs M invested her pension into a specialised, unregulated investment with a limited track record. As a result, I’m satisfied that it’s fair and reasonable to hold Carey responsible for the whole of the loss suffered by Mrs M.

I’m not asking Carey to account for loss that goes beyond the consequences of its failings. I’m satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I’m not able to determine. However, that fact shouldn’t impact on Mrs M’s right to compensation from Carey for the full amount of her loss.

If Carey believes other parties to be wholly or partly responsible for the loss, it should be free to pursue those other parties. And if Mrs M is compensated in full now, Carey (rather than Mrs M) should benefit from any future payments that might be made in relation to the investment. So compensation payable to Mrs M should be contingent on the assignment by her to Carey of any rights of action she may have against other parties in relation to her switch to the SIPP and the investment. It should also be contingent on Mrs M undertaking to give to Carey any future payment she might receive in relation to the investment.

fair compensation

As set out above, I’m satisfied it’s fair and reasonable to hold Carey responsible for the whole loss Mrs M suffered in relation to her carbon credits investment. And I’m satisfied it should therefore put her as close as possible to the position she would probably now be in if she hadn’t invested in carbon credits.

I’m therefore currently planning to require Carey to:

- *Obtain the notional transfer value of Mrs M’s previous pension plan on the date of calculation if it hadn’t been transferred to the Carey SIPP.*

If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) should be used as I’m satisfied that’s a reasonable proxy for the type of return that could’ve been achieved if suitable funds had been chosen.

It’s to be assumed that any contributions or withdrawals that have been made would still have occurred and on the same dates.

- *Compare the notional transfer value of Mrs M’s previous pension (or the fair value calculated by the benchmark) with the actual value of the carbon credits investment. In this case the actual value of the carbon credits investment should be assumed to be nil to arrive at fair compensation.*

- *Pay a commercial value to buy Mrs M’s carbon credits. This can then be deducted from the above compensation.*

The SIPP only exists because of the investment in carbon credits. I think it’d be best if the carbon credits investment could be removed from the SIPP. Mrs M would then be able to close the SIPP, if she wishes. That would allow her to stop paying the fees for the SIPP. Ideally therefore, Carey should assess a commercial value for the carbon credits and take ownership of the investment.

If it’s unable to buy Mrs M’s carbon credits, it shouldn’t make any deduction from the above compensation. It will also then need to pay any future fees for the SIPP until the SIPP can be cancelled. It may wish to require that Mrs M provides an undertaking to pay it any amount she may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the

SIPP. Carey will need to meet any costs in drawing up the undertaking.

- *Pay Mrs M interest of 8% simple a year on the above compensation from the date of the decision to the date compensation is paid – if compensation isn't paid within 28 days of Carey being notified of acceptance.*

- *Increase the SIPP value by the total amount of the above compensation, allowing for any available tax relief and/or costs.*

If it's unable to pay the total amount into Mrs M's SIPP, it should pay the compensation as a cash sum to Mrs M. But had it been possible to pay into the SIPP, it would've provided a taxable income. So the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mrs M's marginal rate of tax at retirement. For example, if Mrs M is a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mrs M would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

- *Refund to Mrs M any fees or charges she's paid from money other than what she transferred into the SIPP – together with interest of 8% simple a year, from the date the fees were paid to the date compensation is paid.*

- *Pay Mrs M £500 for the trouble and upset she's been caused. I'm satisfied the loss of her pension had a significant impact on her and is something she – understandably – found stressful and upsetting.*

Income tax may be payable on any interest awarded. If Carey deducts income tax from the interest, it should tell Mrs M how much has been taken off. Carey should give Mrs M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

my provisional decision

I'm currently planning to uphold Mrs M's complaint and require Carey Pensions UK LLP to pay fair compensation as set out above.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have not received any further submissions from the parties to the complaint.

I would refer the parties to the provisional decision for the full reasoning as to why I believed the complaint should be upheld. I have not received any further submissions from the parties to the complaint and I'm not persuaded that I should depart from the overall conclusions I reached in the provisional decision. As a result, I set out a summary of my main findings including any clarification needed having reconsidered all the available evidence.

The Principles and regulatory publications

I set out in the provisional decision the relevant Principles and regulatory publications I had taken into account in considering whether Carey had complied with its regulatory obligations, *"to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally".*

I accepted that Carey didn't give Mrs M advice but I was satisfied that it should have thought carefully about:

Whether accepting the business from NFAL was treating its customer- Mrs M - fairly; taking reasonable care; and acting with due skill, care and diligence.

Whether accepting the Carbon Credits investment was treating its customer - Mrs M - fairly; taking reasonable care; and acting with due skill, care and diligence.

I also note that in other cases considered by this service, Options has submitted that Adams v Options SIPP [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 (Adams), should be taken into account.

So, to clarify, I confirm I have taken into account the judgment of the High Court and Court of Appeal in respect of Adams, particularly in the context of the application of the Principles and COBS2.1.1R.

I am of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mrs M's case.

I acknowledge that COBS2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mrs M's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I have proceeded on the understanding Carey was not obliged – and not able – to give advice to Mrs M on the suitability of its SIPP or the Carbon Credits investment for her personally. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

I acknowledge Carey has applied to the Supreme Court for permission to appeal the Court of Appeal judgment and the outcome of that application is awaited. However, the grounds of appeal are in respect of issues not directly relevant to my determination of this case and therefore it is unnecessary to await either the consideration of the application or, if permission is granted, the Supreme Court judgment. I am satisfied it is appropriate to determine this complaint now.

The due diligence carried out by Carey on NFAL

In summary, in the provisional decision I set out that:

- Carey should have known about the involvement of NFAL. And it should have obtained a full understanding of its business model, satisfied itself that it would not be carrying out regulated activities and put a clear agreement in place between it and NFAL, ensuring careful thought was given to the risk generally posed to consumers by the introducer. Carey should have undertaken a reasonable level of due diligence on NFAL

- NFAL wasn't regulated to give pensions or investment advice or carry on any other regulated activities - but the evidence suggested that it was carrying out regulated activities by advising on the merits of switching from an existing pension to a SIPP. Carey would have likely discovered that it was giving advice to Mrs M, and this is how she viewed the situation, if it had undertaken a reasonable level of due diligence.

- If Carey had undertaken a reasonable level of due diligence on NFAL, it would have been presented with an image of a small immature company which seemingly could not manage its affairs appropriately.

- Carey should have had significant concerns about NFAL. In particular, through a reasonable level of due diligence, it would have discovered that this was an unregulated introducer with a limited track record, providing advice to Mrs M and specialising in unregulated high-risk Carbon Credit investments.

Bearing that in mind I was satisfied that Carey ought to have known Mrs M's dealings with NFAL were putting her at risk of detriment and I remain of that view.

The due diligence carried out by Carey on the Carbon Credit investment and what it should have concluded

In the provisional decision I set out that Carey should have undertaken a reasonable level of due diligence in respect of the Carbon Credit investment.

To clarify, I accept that on the face of it, it could be argued that a carbon credit investment could be a legitimate investment. However, I think the fair and reasonable conclusion, based on what Carey knew or ought to have reasonably known at the time is that it should not have accepted Mrs M's application to invest in carbon credits. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations or best practice to do so.

The reasons I've reached that conclusion are set out in the provisional decision and can be summarised as follows;

- Carey had received information to the effect that this was an, *"immature market with a limited and slightly chequered history"* and that such investments were unlikely to be appropriate for the majority of retail investors and then only likely suitable for a small element of an investment portfolio for the sophisticated investor.

- Mrs M's actual carbon credit investment contract set out that the investment may be difficult to value, difficult to sell or not possible to sell at any price.

- That, based on the evidence, there was doubt about the validity of Mrs M's Carbon Credit contract – bearing in mind the lack of certainty as to when the credits were generated, what standard the carbon credits were meeting and the fact that project was not registered as suggested by the contract.

- There was a lack of price transparency – a lack of evidence as to how the price of Mrs M's Carbon Credits was being arrived at and on what 'exchange'.

- In essence, at the time there was little confirmation that Mrs M's SIPP was acquiring anything of any realisable value, whether the units existed or, if they did, whether they were being sold at inflated prices.

- Carey should have had concerns about the legitimacy of the investment, whether it could be independently valued, the risk that prices were inflated and whether Mrs M could in future realise the value (if any value) of her carbon credits. It should have taken into account that this was an unregulated investment in which the majority of Mrs M's pension value was being invested. And she was being introduced by, as discussed, an unregulated business specialising carbon credits.

Consequently my view remains that it should have been apparent to Carey that it should not accept the introduction from NFAL or the investment in Carbon Credits. It should have been clear to Carey that by doing so there was a high risk of detriment for Mrs D.

Bearing this in mind and that I have not received any further submissions, having reviewed the complaint I would confirm that my decision remains that the complaint should be upheld for the reasons discussed in this decision and my provisional decision.

Putting things right

I am satisfied that Carey's (now Options UK Personal Pensions LLP) failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mrs M suffering a significant loss to her pension and it is fair to ask Carey to compensate Mrs M.

My aim is therefore to return Mrs M to the pension position she would now be in but for Carey's failings.

I therefore order Options UK Personal Pensions LLP to calculate fair compensation by comparing the current position to the position Mrs M would be in if she had not transferred from her existing pension. In summary, I order Options UK Personal Pensions LLP should:

1. Calculate the loss Mrs M has suffered as a result of making the switch and Carbon Credits investment.
2.
3. Take ownership of the Carbon Credits investment if possible.
4. Pay compensation for the loss into Mrs M's pension. If that is not possible pay compensation for the loss to Mr M direct. In either case the payment should take into account necessary adjustments set out below.
5. Pay £500 for the trouble and upset caused.

I'll explain how I order Options should carry out the calculation set out at 1-3 above in further detail below:

1. Calculate the loss Mrs M has suffered as a *result of making the transfer*

To do this, I order Options to work out the likely value of Mrs M's pension as at the date of my final decision, had she left it where it was instead of switching to the SIPP.

Options should ask Mrs M's former pension provider to calculate the current notional transfer value had she not switched her pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of my final decision and this will show the loss Mrs M has suffered. The Carbon Credit investment should be assumed to have no value.

2. Take ownership of the Carbon Credit investment

Options should take ownership of the Carbon Credit investment, for a nil consideration, if possible.

If Options is unable to take ownership of the Carbon Credit investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. However, it would not be fair for Mrs M to have any ongoing fees to pay in relation to the SIPP. So, in the event Options is unable to take ownership of the Carbon Credit investment (and it can't otherwise be removed from the SIPP), it should waive any fees associated with the SIPP, until such a time as the SIPP can be closed.

3. Pay compensation to Mrs M for loss she has suffered calculated in (1)

Since the loss Mrs M has suffered is within her pension it is right that I try to restore the value of her pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mrs M could claim. The notional allowance should be calculated using Mrs M's marginal rate of tax.

On the other hand, Mrs M may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mrs M direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mrs M should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mrs M's marginal rate of tax in retirement. For example, if Mrs M is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mrs M would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 *for the trouble and upset caused.*

Mrs M has been caused some distress and inconvenience by the loss of her pension benefits. This is money Mrs M cannot afford to lose and the difficulties she has faced in trying to sell an investment she otherwise should not have had would have added to her distress. I consider that a payment of £500 is appropriate to compensate for that upset.

Interest

The compensation must be paid as set out above within 28 days of the date Options receives notification of her acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days

My final decision

For the reasons given, my decision is that I uphold Mrs M’s complaint. Options UK Personal Pensions LLP should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs M to accept or reject my decision before 18 January 2022.
David Bird
Ombudsman